# Supreme Court of the United States

OCTOBER TERM, 1977

**No. 77-861**

TOMMIE ANN HILDEBRAND, *Petitioner,*

v.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD; CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT; and CEL-A-PAK, a California corporation, *Respondents.*

## REPLY BRIEF OF PETITIONER TOMMIE ANN HILDEBRAND

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## INTRODUCTION

In opposing Certiorari, respondent Cel-A-Pak's principal claim is that this case is moot.[1] In contrast, respondent

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[1] See, Brief for Respondent CEL-A-PAK (hereinafter "Cel-A-Pak Br.") at 3-8. Cel-A-Pak also raises an issue regarding the Establishment Clause. This issue will not be discussed here but instead will be addressed should Certiorari be granted. See, Sherbert v. Verner, 374 U.S. 398, 409-10 (1963).

Employment Development Department[2] now fully supports the Petition for Certiorari both on the merits[3] as well as in urging that a live controversy between the parties continues to be present.[4] In this brief, petitioner will essentially make two points. First, given the radical change of position of the respondent Department, it would be appropriate to remand this action to the California Supreme Court for initial consideration of the state agency's new viewpoint. And second, should this Court wish to reach the merits, there exists a continuing case or controversy requiring

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[2]Respondent California Employment Development Department is hereinafter referred to as "the Department".

[3]See, Department Response to Petition for Writ of Certiorari (hereinafter "Dept. Resp.").

[4]See, Reply Brief of Respondent California Employment Development Department (hereinafter "Dept. Reply Br.").



resolution in which the position of petitioner is now strongly supported by the very agency of state government charged with the responsibility of interpreting and administering the provision of the California Unemployment Insurance Code here at issue.

I.

IN LIGHT OF THE REVERSAL OF POSITION BY RESPONDENT CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, THIS CASE SHOULD BE REMANDED TO THE COURT BELOW FOR FURTHER CONSIDERATION.

Throughout the administrative proceedings in this case and in the trial court, respondent Department took the position that the denial of unemployment insurance benefits to petitioner did not contravene her First Amendment right to freely exercise her religion and was justified because petitioner purportedly left her job voluntarily without good

cause.[5] The Department remained silent in the California Court of Appeal and Supreme Court proceedings.[6] Now, for the first time in this litigation, the Department is reversing its original position entirely and instead fully adopting the position of petitioner (Dept. Resp. at 1), agreeing that "such a denial of unemployment insurance benefits because of religious beliefs constitutes overt hostility to religion and should not be upheld." (Dept. Resp. at 12) (citation omitted). Respondent Department joins with petitioner in urging that the decision of the court below should be set aside:

> Respondent California Employ-

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[5] See, California Unemployment Insurance Code Section 1256.

[6] See, Dept. Resp. at 1-2.



> ment Development Department fully supports the petition herein....Respondent Department is...convinced that the California Supreme Court erred when it refused to apply Sherbert [v. Verner, 374 U.S. 398 (1963)] to this case and instead grafted a concept of 'waiver' to the First Amendment right to freely exercise religious beliefs. As the state agency charged with the administration of the Unemployment Insurance system in California, Respondent Department is required in all similar unemployment insurance eligibility decisions to apply the 'waiver' concept as expressed by the California Supreme Court.

> For these reasons, Respondent Department feels that it is imperative that the Petition for Writ of Certiorari be granted. Dept. Resp. at 1-2 (footnote omitted).

Given the Department's radical change of viewpoint, considerations of prudence and respect for state courts make it appropriate for this Court to vacate the decision of the court below and remand the case so that the Supreme Court of California will have the opportunity to consider the views of the Department - at least in the first instance. For example, the lynchpin of petitioner's argument below (as it is here)[7] was that no compelling state interest justified the state's infringement of petitioner's

[7] Petition for Certiorari at 32-42.



First Amendment rights. The state Department involved now readily agrees:

> The California Employment Development Department has no compelling interest which would justify the denial of unemployment insurance benefits to a claimant who quit her job because of an actual conflict between her working conditions and her bona fide religious beliefs. (Capitalization omitted.) Dept. Resp. at 4.

Indeed, the Department now states that granting benefits in such circumstances would have no "adverse effect upon the interest of Respondent Department." Dept. Resp. at 6. This view and several other points now raised by the Department (see, pp. 11-15, infra) were never put before the California Supreme Court; this

action therefore should be remanded so that they may be given plenary consideration by the court below.[8]

Remanding this case for further consideration due to the intervening change of position by respondent Department is supported both by settled Constitutional doctrine and the general policy of this Court in similar circumstances. An analogous situation occurs when the position taken by a federal agency is modified by the Solicitor General in this Court so that it materially differs from the government position expressed in the lower courts. In such cases, which are quite common, this Court consistently

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[8]Due to vacancies existing on the lower court, the original majority in this case included three pro tem Justices sitting by assignment of the Chairman of the Judicial Council. Those vacancies have now been filled and the court is at full complement.



grants Certiorari, vacates the decision, and remands the case for further consideration by the lower court in light of the change of posture by the government.[9] Similar relief is appropriate in the case sub judice.

Moreover, because the several new factors now raised by the Department were either absent entirely or only tangentially involved when the case was initially considered, they were not directly passed upon by the California Supreme Court.

While this Court nonetheless may have

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[9]See, e.g., Rahman v. Immigration and Naturalization Service, 429 U.S. (mem.) 1084 (1977); Singer v. United States Civil Service Comm., 429 U.S. (mem.) 1034 (1977); Hurst v. United States, 426 U.S. (mem.) 902 (1976); Graham v. United States, 424 U.S. (mem.) 903 (1976); Webb v. United States, 412 U.S. (mem.) 902 (1973); Lenhard v. United States, 405 U.S. (mem.) 1013 (1972).

the authority to review these matters as issues of first impression,[10] it would be in keeping with this Court's previous decisions to allow the California Supreme Court the initial opportunity to do so. See, e.g., Massachusetts v. Westcott, 431 U.S. 322 (1977); Cardinale v. Louisiana, 394 U.S. 437, 439 (1969); McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430, 434-435 (1940); see also Hagans v. Lavine, 415 U.S. 528, 543 (1974).[11]

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[10] Hankerson v. North Carolina, 432 U.S. 233, 240, n.6 (1977); McGoldrick v. Compagnie Generale Trans Atlantique, 309 U.S. 430, 434 (1940).

[11] It should also be noted that the issue of mootness here presented was not addressed by the court below. While petitioner vigorously contests this claim (see, pp. 15-36, infra) a remand to the court below would permit the California Supreme Court initially to make that determination, taking into account the newly recognized interests of the Department as well as those of petitioner and

(fn. contin. next page)



The Department's renewed participation in this case either raises or substantially influences several issues not previously considered by the lower court that are potentially of dispositive importance. These include inter alia the following:

First, as noted above, petitioner has contended throughout that no compelling or otherwise legitimate government interest requires the denial of benefits to claimants who become unemployed due to the good faith exercise of religious beliefs. Respondent Department, in the best position to evaluate the government interest involved, now fully concurs and

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(fn. contin. from preceding page) of Cel-A-Pak. See, e.g., DeFunis v. Odegaard, 416 U.S. 312 (1974); Brockington v. Rhodes, 396 U.S. 41 (1969); cf., Indiana Empl. Security Div. v. Burney, 409 U.S. 540 (1973); A.L. Mechling Barge Lines, Inc. v. United States, 368 U.S. 324 (1961).

urges that they have no interest in denying benefits to claimants like petitioner. Dept. Resp. at 4-12.[12] The Department strongly objects to now being required by the lower court's interpretation of the First Amendment to "disqualify from receipt of unemployment insurance benefits California workers who feel bound to follow sincerely held religious convictions." Dept. Resp. at 4. This assessment of the state's interest was not before the court below when it initially reached its decision.[13]

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[12]While the employer has an interest in the administration of the Unemployment Insurance System, it is the state's interest that is controlling for purposes of Constitutional analysis, see, Petition for Certiorari at 38-39.

[13]At least one Justice of the court below believed that a principle basis underlying the majority opinion was doubt regarding the sincerity of petitioner's religious beliefs. Appendix A at 19a

(fn. contin. next page)



Second, an inherent premise for the decision of the majority below was that a rule barring such claimants from obtaining benefits was essential in order to protect the integrity of the trust account. But the Department has now come forward with a proposed set of procedures which would protect against invalid or fraudulent claims but not deny benefits to claimants acting on deeply held religious convictions. Dept. Resp. at 6-8. This approach, not considered by the court below, would provide a less drastic alternative to the flat ban now imposed by the California Supreme Court decision.

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(fn. contin. from preceding page)
(Mosk, J., dissenting). Although Department officials initially questioned petitioner's sincerity, "[u]pon review of the record and the Superior Court's decision, Respondent Department agree[s] that Petitioner may fairly be said to have had an actual conflict between her working conditions and her bona fide religious beliefs." Dept. Resp. at 6.

See, Bakke v. Regents of University of California, 18 Cal.3d 34, 49 (1976); cf., Dunn v. Blumstein, 405 U.S. 330, 342-43 (1972).

Third, and perhaps most significantly, the Department now urges that the "good cause" provision of California Unemployment Insurance Code Section 1256 (voluntary quit), like the almost identical provision of Section 1257 (refusal of suitable work offer), is intended to include within its scope the loss of employment due to the exercise of religious beliefs. Dept. Resp. at 12; accord, Petition for Certiorari at 25-26; compare Appendix A at 8a-9a. Under California law, state courts are to give substantial deference to statutory interpretations by appropriate governmental agencies in making determinations such as



the one here involved.[14] Until now, the court below has not had the opportunity to do so since the Department's views were not available. This case should thus be remanded to the California Supreme Court for consideration of the Department's position on the scope of Section 1256. Cf., Cardinale v. Louisiana, 394 U.S. 437, 439 (1969).

II.

**THE LITIGANTS AND THE PUBLIC AT LARGE HAVE A SUBSTANTIAL STAKE IN THE OUTCOME OF THESE PROCEEDINGS AND FOR THAT REASON THERE IS A CASE OR CONTROVERSY.**

While we suggest the appropriate disposition of this case would be to vacate the decision below and remand the case for further proceedings, should this Court instead choose to reach the merits,

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[14] See, e.g., Morris v. Williams, 67 Cal. 2d 733, 748 (1967); Naismith Dental Corp. v. Board of Dental Examiners, 68 C.A.3d 253, 260 (1977); Handeland v. Department of Real Estate, 58 C.A.3d 513, 517 n.4 (1976).

the mootness doctrine presents no barrier to it doing so. Respondent Cel-A-Pak argues, without citation of authority, that there is no case or controversy before this Court. (Cel-A-Pak Br. at 3.) Respondent's simplistic analysis, however, is belied by the very real and significant consequences affecting the litigants and the public generally which hinge on this Court's review of the decision of the court below.

The mootness doctrine is premised upon both the requirement of Article III of the Constitution that the jurisdiction of the federal courts be limited to "cases and controversies" as well as notions of sound judicial administration. The Court recently reaffirmed this analysis as follows:

> "Embodied in the words 'cases' and 'controversy' are two compli-



> mentary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government."

Franks v. Bowman Transportation Co., 424 U.S. 747, 754-55 (1976) quoting Flast v. Cohen, 392 U.S. 83, 94-95 (1968).

Thus, the doctrine serves two principal purposes: (1) to ensure true adversariness and in so doing also preventing the useless expenditure of judicial resources; and (2) to constrain the judiciary from interfering with other branches of government.[15] As we will show in this section, neither of these purposes suggest a finding of mootness is appropriate in the instant case.

A. The Record In This Case Amply Demonstrates That A Decision By This Court Will Have A Significant Effect On All Litigants Before It.

A reversal of the lower court's decision would directly effect each of the parties to this action.

The briefs respondent Department has

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[15] See, Note, The Mootness Doctrine in the Supreme Court, 88 Harv. L. Rev. 373, 375-376 (1974); see also, Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction, §3533, p. 265.



filed before this Court provide perhaps the best indication of its continued stake in these proceedings. Although it agrees that the rule imposed by the California Supreme Court contravenes the First Amendment, as well as the purposes of the unemployment insurance program it administers, respondent Department will be bound to apply this rule in the future to petitioner and to all similarly situated claimants.[16] Only through the

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[16] Respondent Department states:

> As the state agency charged with the administration of the Unemployment Insurance system in California, Respondent Department is required [to deny benefits to claimants who become unemployed for religious reasons] in all similar unemployment insurance eligibility decisions...." Dept.Resp.at 2.

As a procedural matter, had the Department chosen to petition for Certiorari, rather than support the petition filed by Ms. Hildebrand, there would be no question but that a case or controversy exists. See, Mancusi v. Stubbs, 408 U.S. 204 (1972).

action of this Court can the Department escape that burden. In addition, should the decision below be reversed, the Department will then be authorized to charge respondent Cel-A-Pak's "reserve account" rather than the "balancing account" supported by all California employers.[17]

The interest of respondent Cel-A-Pak is even more apparent. Cel-A-Pak has a concrete stake because of its interest in protecting its reserve account (Cel-A-Pak Br. at 7-8; see also Dept. Reply Br.) as well as an interest in its future responsibilities toward its employees.

Petitioner likewise has a vital and

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[17] See California Unemployment Insurance Code Sections 976-978, 1025-1032.



continuing interest in the outcome of these proceedings. She remains subject to future disqualification from the receipt of unemployment insurance benefits by respondent Department resulting from application of the rule fashioned by the California Supreme Court. Moreover, knowledge of this rule results in a "chilling effect" on her exercise of First Amendment rights. (See pp. 28-30, infra.) As a Sabbatarian, any new employment she finds subjects her to the same potential conflicts between her religious beliefs and her employer's demands, and, unless she forsakes those beliefs, the same disqualification from the unemployment insurance program. She has a sufficient stake in the outcome of these proceedings to warrant this Court's

assumption of jurisdiction.[18]

Thus, in terms of the policies underlying the mootness doctrine, a decision by this Court plainly would not be a useless act or an advisory opinion. Instead, it would be an appropriate review of an important Constitutional question resolving an ongoing dispute in which all parties have an interest.

1. If allowed to stand, the decision of the California Supreme Court interpreting the Free Exercise Clause will be binding on the Department and on unemployment insurance claimants throughout California.

This Court has consistently recognized that where a lower court decision will have a tangible and definite effect on a state's policy with respect either to the

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[18] See, e.g., Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175 (1968); Super Tire Eng'r Co. v. McCorkle, 416 U.S. 115 (1974).



particular litigants or others similarly situated, the mootness doctrine does not bar review. The Court's decision in Richardson v. Ramirez, 418 U.S. 24 (1974) is squarely on point. There, the California Supreme Court ruled that California provisions disenfranchising ex-felons were unconstitutional. A county registrar who had intervened as a defendant appealed to this Court; respondents urged that the case was moot because the three plaintiffs had been allowed to register and vote in their respective counties. Recognizing that absent review, county officials throughout California would be bound to follow the decision of the California Supreme Court, this Court held that the case was not moot:

> By reason of the special relationship of the public officials in a state to the

> court of last resort of that state, the decision of the Supreme Court of California, if left standing, leaves them permanently bound by its conclusion on a matter of federal constitutional law. 418 U.S. at 35.

Respondent Department is similarly bound in the instant case. As in Ramirez, this case was brought as a mandate action against state officials.[19] Although not a class action, the California Supreme Court's decision will bind the respondent Department which will then be required to apply its provisions to unemployment insurance claimants and California employers. To deny the

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[19] Id. at 35 and 40, n.13.



availability of review would be to leave a federal Constitutional decision in force "without any possibility of state officials who were adversely affected by the decision seeking review in this Court." Id. at 40, n.13.

Similarly, in Super Tire Eng'r Co. v. McCorkle, 416 U.S. 115 (1974), this Court found a case or controversy existed in an employer's challenge to New Jersey's laws allowing strikers to be eligible for welfare benefits although the strike prompting the challenge had long since ceased. The Court's holding centered on the continuing effects of the "fixed and definite" (Id. at 124) governmental policy being challenged:

> [T]he challenged governmental activity in the present case is not contingent, has not evaporated or disappeared, and, by its con-

tinuing and brooding presence, casts what may well be a substantial adverse effect on the interests of the petitioning parties. 416 U.S. at 122.

Likewise, if allowed to stand, the California Supreme Court's decision becomes the "fixed and definite" interpretation of Section 1256 binding not only on future claims of petitioner but all other workers whose religious beliefs may create a conflict with the demands of their employers.

In Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175 (1968), county officials had obtained a 10-day injunction against the petitioners, restraining them from holding political rallies, which the Maryland Court of Appeals had affirmed. The petitioners sought review from this Court, contending



that the injunction order continued to affect them because local officials had on several occasions denied them rally permits or issued them only very limited permits, based on the Court of Appeals' decision. This Court found:

> We agree with petitioners that the case is not moot. Since 1966, petitioners have sought to continue their activities, including the holding of rallies in Princess Anne and Somerset County, and it appears that the decision of the Maryland Court of Appeals continues to play a substantial role in the response of officials to their activities. In these circumstances, our jurisdiction is not at an end. 393 U.S. at 178 (footnote omitted).

Similarly, the California Supreme Court's ruling, if allowed to stand, will govern all present and future determinations by the respondent state agencies as to whether religious beliefs can constitute good cause for leaving work. Given the significant Constitutional dimensions of the state's policy, and its conflict with this Court's decision in Sherbert v. Verner, 374 U.S. 398 (1963), the need for and propriety of review by this Court is manifest.

2. Absent review by this Court, several collateral consequences will result from the decision below adversely affecting petitioner and "chilling" the exercise of First Amendment rights.

Unless reversed by this Court, the decision of the court below will result in serious and detrimental "collateral consequences" to petitioner Hildebrand and other workers with strongly held



religious beliefs.[20]

One such consequence will be the "chilling effect" on the exercise of religious beliefs by petitioner.[21] The exercise by petitioner of her First Amendment rights is now subject to "waiver" under the decision of the California Supreme Court; petitioner is aware that if she accedes to an employer's demand to violate her religious precepts even once, she may never again be able to adhere to them without fear of firing and denial of unemployment benefits. On the other hand, California

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[20] See, Sibron v. State of New York, 392 U.S. 40, 53-58 (1968); Southern Pacific Co. v. ICC, 219 U.S. 433, 452 (1911); Kates & Barker, Mootness in Judicial Proceedings: Toward a Coherent Theory, 62 Cal.L.Rev. 1385, 1391-94 (1974); see also Carroll v. President and Commissioners of Princess Anne, supra.

[21] See Allee v. Medrano, 416 U.S. 802, 810 (1974); see also Super Tire Eng'r Co. v. McCorkle, supra.

employers will be strongly encouraged by the California Supreme Court's decision not to make even a "reasonable accommodation"[22] to religious beliefs. They will be aware that in order for employees like petitioner to assert religious convictions, they must run the serious risk of loss of employment and disqualification from the receipt of sustaining unemployment benefits. In light of these effects, the California decision should not be allowed to escape review.

3. The Constitutional injury here involved will necessarily be repeated but will evade meaningful review.

The policies authorizing this Court to entertain cases which are "capable of repetition yet evading review[23] also

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[22] See, Trans World Airlines, Inc. v. Hardison, ____ U.S. ____, 97 S.Ct. 2264 (1977).

[23] See Southern Pacific Terminal v. ICC, 219 U.S. 498, 515 (1911).



support the Court's jurisdiction in this case. There can be little doubt that if the decision of the California Supreme Court is allowed to stand, the petitioner, as well as other persons in her position, will be denied benefits in similar situations and will suffer the same infringement on their right to free exercise of religion.[24] Indeed, the respondent Department correctly believes itself bound to implement the rule fashioned by the lower court, although the Department believes it will be violative

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[24] That the injury complained of here will also affect persons situated similarly to the petitioner is sufficient to demonstrate a case or controversy. See, Roe v. Wade, 410 U.S. 113 (1973); Moore v. Ogilvie, 394 U.S. 814 (1969). Citing these cases, this Court said in Super Tire Eng'r Co. v. McCorkle, supra:

> The important ingredient in these cases was governmental action directly affecting, and continuing to affect, the behavior of citizens in our society.
> 416 U.S. at 126.

of claimants' constitutional rights to do so. Resp. Br. at 2.

Despite this strong likelihood of repetition, it is highly unlikely that any future claimant, disqualified by the rule set out in this case, will be able to obtain effective review from this Court. First, such review would require futile appeals through two levels of the administrative process, the California Superior Court, District Court of Appeal, and California Supreme Court, before finally reaching this Court.[25]

Second, and perhaps more importantly, by the time such a case reached this Court, the salutory purposes which the unemployment program was designed to achieve would long since have been lost for that claimant. See, California Department of Human Resources Development

[25]Franks, supra, 424 U.S. at 757.



v. Java, 402 U.S. 121, 133 (1971).[26] This Court has frequently looked to the purposes of the statute at issue to determine whether a case or controversy exists. See, e.g., Wirtz v. Local 153, Glass Bottle Blowers Ass'n, 389 U.S. 463 (1968); see also NLRB v. Raytheon Company, 398 U.S. 25 (1970); Liner v. Javco, Inc., 375 U.S. 301 (1964). Since neither the state agency administering the program nor any ineligible claimants could seek effective review of subsequent

[26]As the Chief Justice has pointed out, the purpose of the unemployment insurance program is to "get...money into the pocket of the unemployed worker at the earliest point that is...feasible" (Id. at 135). And, further:

> Paying compensation to an unemployed worker promptly after initial determination of eligibility accomplishes the congressional purposes of avoiding resort to welfare and stabilizing consumer demands; delaying compensation until months have elapsed defeats these purposes.
> Id. at 133.

determinations based on the lower court's decision in this case, the instant action falls within the ambit of cases "capable of repetition, yet evading review." Roe v. Wade, 410 U.S. 113, 125 (1973).

### B. Granting Certiorari In This Case Would Not Result In Judicial Interference With Another Branch Of Government.

Since this action involves the California Supreme Court's Constitutional construction of a state statute, granting review would not intrude on areas reserved for any other branch of the government. See Franks v. Bowman Transportation Co., supra, 754-55. To the contrary, the judicially created rule here at issue is itself in direct conflict with both the policies and statutory interpretation of "the state agency charged with the administration of the



Unemployment Insurance System in California." Dept. Resp. at 2.

## III.

## CONCLUSION

That this case presents a lively and hotly contested dispute, assuring the requisite adversariness, is readily apparent from the record in this case. The petitioner vigorously opposed respondent Cel-A-Pak's appeal in the California District Court of Appeal and Supreme Court. Moreover, the respondent Department's support of the Petition adds a new dimension of adversariness, for without review by this Court, it will be forced to apply a statute in a manner which it feels is unconstitutional and harmful to the persons the system it administers is designed to serve. The Petition for Certiorari should be granted and the opinion below either vacated and

remanded for further consideration or

reversed in its entirety.

Respectfully submitted,

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